

in my judgment, that the order of forfeiture, there being a written application by the Public Prosecutor, was properly made.

Appeal dismissed.

Solicitors: *L. M. Ong & Co.*

MALAYSIAN REPORTS

YEAP CHENG HOCK v.

KAJIMA-TAISEI JOINT VENTURE

[Q.C.J. (Syed Agil Barakbah J.) October 10, 1971]

[Alor Star — Civil Suit No. 70 of 1968]

B *Negligence — Occupier's liability — Licensee — Duty of occupier — Negligence in putting machinery into operation when visitors were present — Quantum of damages — Loss of future earnings — Geologist — Amputation of leg — Special damages — To be proved by plaintiff.*

Damages — Leg — Amputation of — Loss of future earnings.

C The plaintiff was a geologist working with a mining company. The defendants were contractors carrying out tunnelling operations in Kedah. The plaintiff was one of a party of the Geological Society of Malaysia visiting a tunnel which was being constructed by the defendants. The visit was for the purpose of geological survey and examination of rocks. They were led into the tunnel by the defendants' servants. While they were inspecting some rocks, certain machinery under the control and management of the defendants began to operate without any warning. The plaintiff and his party in their fright and excitement attempted to evacuate to a place of safety. In doing so the plaintiff's leg was crushed by machinery in the tunnel and later had to be amputated. The plaintiff brought an action for damages against the defendants for the injuries sustained by him due to the alleged negligence of the defendants, their agents or servants. After the accident, the plaintiff's employer did not terminate his employment but allowed him to carry on his former duties as geologist with the same salary as before. It was agreed by both parties that should the court find the defendants to be solely negligent a sum of \$32,500 should be awarded to the plaintiff as general damages for pain and suffering and loss of amenities.

F *Held:* (1) the plaintiff was a licensee and therefore the defendants were bound not to create a trap or to allow a concealed danger to exist upon the premises, which was not apparent to the plaintiff as a visitor, but which was known or ought to be known to the defendants;

(2) on the facts and circumstances of this case there was evidence to show that the defendants were negligent as they did not warn the plaintiff of the dangers which were known to them and the defendants, their servants or agents were negligent in putting into operation the machinery in the tunnel when the plaintiff and the other visitors were present;

G (3) although the plaintiff had been allowed to continue in his former job, his promotional prospects would be affected and, if he was retrenched, he would find it difficult to get a job with another company. In the circumstances the sum of \$40,470.00 would be fair and reasonable for loss of future earnings.

Cases referred to:-

- H** (1) *Latham v. Johnson* [1913] 1 K.B. 398, 410.
(2) *Mersey Docks and Harbour Board v. Proctor* [1923] A.C. 253.
(3) *Robert Addie & Sons (Collieries) v. Dumbreck* [1929] A.C. 358, 365.
(4) *Hawkins v. Coulsdon & Parley Urban District Council* [1954] 1 Q.B. 319.
(5) *Pearson v. Lambeth Borough Council* [1950] 2 K.B. 353, 364.
I (6) *Donoghue v. Stevenson* [1932] All E.R. Rep. 1.
(7) *Le Lievre & Anor. v. Gould* [1893] 1 Q.B. 491.
(8) *British Transport Commission v. Gourley* [1956] A.C. 185.
(9) *Sum Kum v. Devaki Nair & Anor.* [1964] M.L.J. 74, 75.
(10) *Khoo See Moi v. Tay Teik Cheng* [1970] 2 M.L.J. 249, 250.

CIVIL SUIT.

David Tay for the plaintiff.

N. A. Marjoribanks for the defendants.

Syed Agil Barakbah J.: This is a claim by the plaintiff for damages against the defendants for injuries sustained by him due to the alleged negligence on the part of the defendants, their agents or servants.

The plaintiff was a geologist working with the Associated Mines, Kuala Lumpur. The defendants at the material time were contractors carrying out tunnelling operations at Saiong Tunnel for the purpose of the Muda Irrigation Scheme near Alor Star in the State of Kedah. On the 3rd day of November, 1967, the plaintiff was one of a party of the Geological Society of Malaysia visiting a tunnel which was being constructed by the defendants. Their visit was for the purpose of geological survey and examination of rocks. They were led into the tunnel by the defendants' servants. In the course of inspecting some rocks, certain machinery under the control and management of the defendants began to operate without any warning. The plaintiff and his party in their fright and excitement attempted to evacuate to a place of safety. In doing so the plaintiff's leg was crushed and later had to be amputated. The plaintiff alleged that the accident was caused by the negligence of the defendants, their servants or agents. The defendants, on the other hand, denied the allegation and maintained that the alleged injury was caused solely or alternatively contributed to by the negligence of the plaintiff.

The depositions of some of the witnesses were recorded *de bene esse* and application was made to the court under Order 37 rule 18 of the Rules of the Supreme Court for the said depositions to be given in evidence at the trial. Both counsel informed me that the parties had given their consent thereto and assured me that the four witnesses whose depositions were recorded by the Assistant Registrars of the High Court, Kuala Lumpur, were no longer in the country. I accepted the assurance and, considering the fact that both parties had consented to the course to be taken, I am satisfied that the four persons were beyond the jurisdiction of this court. I am further of the opinion that the course to be pursued will not result in injustice. The depositions were marked Exhibits P6, P7 and P8 for the plaintiff, and D2 made by the only witness for the defendants.

It was agreed by both parties that should the court find the defendants to be solely negligent, a sum of \$32,500 should be awarded to the plaintiff for pain and suffering and loss of amenities in so far as general damages are concerned. The main issue therefore was for this court to determine the question of negligence which was disputed.

There is little dispute concerning the facts surrounding the accident. It is common ground that the party consisted of eight geologists who visited the scene to examine rock materials in the tunnel. The facts as supported by the evidence of various witnesses are as follows:—

A On the 3rd November, 1967, at about 5.00 p.m., the plaintiff together with seven others forming a party organised by the Geological Society of Malaysia visited the Saiong Tunnel which was part of the River Muda Irrigation Scheme. The others were Dr. B. N. Koopmans and Dr. P. H. Stauffer who were the leaders of the party and Mr. T. M. Kee, Mr. J. D. Bignell, Mr. D. S. Dhillon, Mr. T. T. Khoo and Mr. S. P. Sivam. They entered the Saiong Tunnel through the adit led by two Japanese engineers, namely, Mr. Atsuyoshi Akabori and Mr. Osabe. Having descended by way of the adit to the tunnel floor they were taken by locomotive to a spot near the rock face, *i.e.* the inner most portion of the tunnel. On arrival at that spot they got out of the locomotive to walk to the tunnel face. In walking to the tunnel face they had to pass huge machinery on the way, namely, the train loader which practically filled the tunnel and some trucks running between and under the train loader. The train loader is a huge machine mounted on eight columns, each column with a wheel at its foot and these wheels rested on two rails (or a set of rails) on the tunnel floor (hereinafter referred to as the "outer rails" — see page 5 of the agreed bundle). Between this outer rails was another set of rails on the tunnel floor (hereinafter referred to as the "inner rails"). The inner rails were used by a chain of trucks running between and under the train loader. The train loader was used to load debris left behind by the blasting of the rock face on to the trucks.

E The party having got down from the locomotive went to the rock face through a path between the outermost portion of the train loader and the tunnel wall led by the Japanese engineers. On arrival at the rock face they found that charges had already been placed there and that they were about to be blasted. **F** The party was then led from the rock face in the direction of the tunnel entrance in contemplation of the blasting. After walking away for some distance, without any warning the blasting at the rock face took place. Subsequently the party then went back to the rock face being led again by the Japanese engineers. On arrival they began examining the rocks and rock structure. **G** After a brief moment, without any warning, a rocker shovel began operating near them. The rocker shovel is a small tractor-like machine with a sort of scoop-like attachment at the front with fork-like teeth which was used to scoop up the debris and to clear the rails, apart from being used for moving the train loader. The rocker shovel was operated very close to the members of the visiting party sometimes within six inches away from their feet and thereby caused great concern and alarm amongst them. As a result of the dangerous operation some of the visitors retreated from the rock face on a signal from Dr. Stauffer. Mr. Panchatcharasivam (PW3) moved away followed by the plaintiff, Mr. Khoo Teng **H** Tiong and Mr. Bignell in single file. They were walking away somewhere along the centre of the tunnel floor. But as they approached the train loader they saw some trucks moving on the inner rails towards them obstructing their path. As a result they moved to their right as one faces the tunnel entrance from the rock face. They passed the first column of the train

loader nearest the rock face by moving between it and the tunnel wall. That was the other alternative way out when the centre path was blocked. The space between this first column and the tunnel wall was quite narrow and according to PW3 he had to step sideways in order to pass through. Having passed the first said column of the train loader they proceeded onwards in the direction of the tunnel entrance moving in the space between the train loader and the tunnel wall. After having gone a short distance the train loader suddenly started to move towards them. As they groped their way forward, the second column of the train loader came towards them. The projection of the wheel of this second column jammed the left legs of PW3 and the plaintiff against a rock projection on the tunnel wall. At this point they started shouting through sheer fright, panic and pain. PW3 fortunately suffered only bruises and lacerations on his left leg but the plaintiff was not so fortunate and suffered a severe injury of the left leg just below the knee. As a consequence he had to have his left leg amputated above the knee.

The lighting according to the evidence was inadequate in the circumstances and it was extremely difficult for the members of the party to be able to see clearly. The lighting was by means of bulbs spaced about 15 feet to 20 feet apart attached to the centre portion of the tunnel ceiling and was of such a nature as to only light up the area directly beneath the bulbs but not the other areas of the tunnel which were outside the direct rays of the bulbs.

There are three main points for consideration, namely:—

- (1) The legal aspect.
- (2) The question of liability on the facts.
- (3) Quantum of damages.

In regard to the first point, it was submitted by Mr. Marjoribanks for the defendants that the plaintiff was a licensee as he came lawfully on the tunnel site but not on any business that concerns the defendants who are the occupiers.

There are three categories in which persons visiting premises belonging to another person may fall. They may go:—

- (1) by the invitation, expressed or implied, of the occupier;
- (2) with the leave and licence of the occupier; and
- (3) as trespassers.

At common law a licensee is one who is lawfully on the premises, in the sense that he is not a trespasser, but does not come within the description of an invitee because he does not enter on business which concerns the occupier. He is there with the permission of the occupier given as a matter of grace or pleasure and not as a matter of business. "Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees. The law does not take account of the worldly advantage which the host may remotely have in view." (See *Charlesworth* on Negligence, 4th Edition, page 207, paragraph 438, and *Latham v. Johnson*,⁽¹⁾ per Hamilton

L.J.). In the present case, the plaintiff was one of a party of geologists who entered the tunnel site after obtaining permission so to do for their own purposes, i.e. to inspect the rock formation and other matters of interest to geologists. In the circumstances, I hold that the plaintiff was a licensee and not an invitee.

The status of the plaintiff as licensee and the obligations of the defendants as occupiers are different from those of an invitee. "The duty to an invitee differed broadly from that owed to a licensee in that the invitor was liable for the dangers of which he ought to have known as well as for those of which he actually knew, whilst the licensor was only bound to warn of traps of which he knew." (*Charlesworth* on Negligence, 4th Edition, page 202, paragraph 424).

The common law duty to a licensee is illustrated by the judgment of Lord Sumner in the *Mersey Docks and Harbour Board v. Procter*,⁽²⁾ at page 274:—

"A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it."

In other words, the occupier is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known, or ought to be known, to the occupier. (*Robert Addie & Sons (Collieries) v. Dumbreck*,⁽³⁾ per Lord Hailsham L.C.).

What is a trap? In the words of Hamilton L.J. in *Latham's* case, *supra*, at page 415:—

"A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger...."

Mr. David Tay for the plaintiff submitted that on the assumption that the plaintiff was a licensee, there is a duty imposed on the occupier to warn the licensee of the concealed dangers actually known to the occupier which were not known to the licensee or not obvious to him. Now, in considering whether the occupier knew of the danger, an objective test has to be applied. If he knew of the physical facts constituting the danger and a reasonable man with that knowledge would have appreciated that those facts constituted a trap or a concealed danger, then the occupier had knowledge of the danger even if he himself did not appreciate that they did so. (*Hawkins v. Coulsdon & Purley Urban District Council*⁽⁴⁾). Again, "to have actual knowledge of the danger the defendant or his servants need not know of the actual presence on the premises at the time of the accident of the physical object which, in the result, causes the injury. It is enough if such an object has been there in the past and a similar object may be there again if no sufficient

precautions have been taken to prevent its presence.” (Pearson v. Lambeth Borough Council,⁽⁵⁾ per Asquith L.J.).

In the present case it is common ground that the metal plunger or the projection of the wheel of the train loader came into contact with the plaintiff's leg and caused the injury. The accident occurred at a projection in the tunnel wall where the plaintiff and PW3 and some others had gone to in order to escape from the truck which suddenly moved towards them along the inner rails and when the train loader also began to move towards the tunnel face along the outer rails thereby leaving insufficient space for the plaintiff to stand safely by to allow the wheel column to pass. The projection was more or less ankle level and although evidence adduced indicated that the tunnel was sufficiently lighted, the projection was the furthest portion away from the bulbs of the tunnel ceiling. According to the plaintiff the lights in the tunnel were inadequate to light up the whole place because it was dim in the area outside the vicinity and the train loader would also obstruct the lights. This was substantiated by PW3 who was leading the group making their exit that he could hardly see ahead and what visibility there was, was restricted to ghost-like apparitions. Considering the circumstances, the moving truck and the train loader could have cast considerable shadows and block whatever trickle of light there might have been at the level of the rock projection. Even Mr. Akabori, the only witness for the defendants, was doubtful whether a person walking along would notice the rock edge. That was the first time that the plaintiff and the visiting party visited the tunnel. Although they had used the space between the wall and the train loader on their way to the rock face earlier, it would be reasonable to accept that the plaintiff was unaccustomed to the physical condition and the movements of machinery in the tunnel. No machinery was in motion when the party first entered. In the circumstances, it would be unreasonable to expect the plaintiff to notice the rock projection and, for that matter, the metal plunger of the train loader. Taking into account all these factors, I have no hesitation to conclude that the projection was hidden or concealed from the plaintiff and the defendants or their servants who were familiar with the conditions in the tunnel knew or ought to have known of the concealed danger, i.e. the projection on the wall. They were the persons who were constructing the tunnel and the rock projection was part and parcel of the construction and they must have known of its presence well before the plaintiff and party entered the tunnel under the guidance of two of the defendants' servants. Mr. Akabori in his evidence knew that the side of the wall was irregular and that the variation of the wall to the outer rail of the train loader was about six inches. I do not hesitate to conclude from the facts and surrounding circumstances stated above that negligence on the part of the defendants has been proved. On the other hand, I am of the opinion that the plaintiff did not in any way contribute to his injury by his own negligence because he was placed in such a position that by not taking reasonable care of himself as a reasonably prudent man he could not have reasonably foreseen that he

A might hurt himself. He was not bound to foresee that the defendants might be negligent unless experience showed a particular form of negligence to be common in the circumstances. (See *Halsbury's*, 3rd Edition, page 90, paragraph 93).

There is yet another ground for which I hold the defendants, their servants or agents were negligent. B The performance of dangerous work and the possession and use of dangerous things impose a duty to take special precautions. The duty of care extends to work performed on land or buildings, but in England where the person who does the work is also the occupier, the Occupier's Liability Act, 1957, applied with regard to his duty to visitors. In this country, C however, I am of the opinion that in the absence of statutory provisions, the common law applies. The law then is that of the objective test of negligence as formulated in the classic case of *Donoghue v. Stevenson*⁽⁶⁾ which is so lucidly illustrated by Lord Atkins. At page 11 his Lordship says:—

D “The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

E Lord Esher M.R. said in *Le Lievre & Another v. Gould*,⁽⁷⁾ at page 497:—

“That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.”

F If machinery is at times stationary and at times set in motion without warning, there is no duty to warn a trespasser unless he is actually known to be on the land, whereas, according to the circumstances, there may be a duty to see whether lawful visitors are present before setting the machinery in motion. (Per Lord Hailsham in *Robert Addie & Sons (Collieries) v. Dumbreck*, *supra*). Thus, even in the case of a trespasser G there is a duty to abstain from doing an act which if done carelessly must be reasonably contemplated as likely to injure him when he is known to be present.

I It was urged by the defence that Mr. Akabori had requested Dr. Koopmans, the leader of the party, that they must keep together and not to separate from one another. In spite of that, the party broke away from the rock face leaving Dr. Koopmans and three others behind. It was also submitted that on seeing the trucks approaching the plaintiff and the others could have turned back to the tunnel face and asked the professor whether it was safe to proceed. There was no danger from the trucks as the plaintiff could have walked faster than the trucks which were proceeding at a very slow speed. With respect, I cannot agree. In the first place, other than asking the party to keep together, there was not an iota of evidence to indicate that the party was warned that machinery would be in motion during their visit and no instructions were given on any safety precautions that must be taken in

the circumstances. It was natural for the plaintiff to be frightened when the rocker shovel suddenly came into motion working to about six inches or so from his feet. No attempt was ever made either by Mr. Akabori or the other Japanese guide to stop the rocker shovel from working. Mr. Akabori appeared to have taken for granted that since the party's visit was "uninformed", normal work would be continued during the visit and the members of the party would have to look after themselves. I do not understand what he meant by "uninformed" visit because, according to his evidence in P2, he rang up the Resident Engineer for permission to bring the party inside the tunnel after the two professors had come to his office to inform him of their visit. Even after that none of the party appeared to have been warned that work would be carried on as usual and machinery would be in motion. Further, there was evidence that when the rocker shovel began to operate dangerously near them, Dr. Koopmans gave a hand signal for them to leave. When they did so, no attempt was made by either Mr. Akabori or the other guide to call them back or to see that the trucks do not move. They were already scared and frightened and it was natural for them to be more frightened on seeing the trucks moving towards them blocking their path. To run back to the rock face would result in meeting the rocker shovel which was the main cause of their evacuation. The only alternative was therefore to proceed to the side where there was a space near the tunnel wall which they had used earlier. To my mind, it would be a different matter if the train loader did not come into motion when the plaintiff and PW3 and the others were making their way through the narrow space between the wall and the train loader even in semi-darkness. One could imagine the position the plaintiff and his friends were placed in when the train loader suddenly began to move without warning. That was the third unexpected occurrence. I think that experience would be too much for any reasonable and prudent man. In that terrifying and unexpected moment one would expect that everyone of them was trying his level best to do something in order to escape from getting injured. During the whole period what did the guide Mr. Akabori do? He did nothing. In his own words, he said: "After hearing the scream, I signalled to the driver of the rocker shovel to stop. He stopped." Had he done so much earlier on realising the danger that the visiting party were faced with when the rocker shovel started to work, the accident would not have happened. Mr. Akabori also said: "I did not realise the students had gone away. When I realised they had gone I would not say where they were." He did not ask Dr. Koopmans to call them back when he should have realised the danger the plaintiff and the others would be faced with, knowing all the time that the other machinery would be in motion apart from the rocker shovel. Further, when Dr. Koopmans gave the signal, it would be reasonable for the plaintiff to infer that he must have got the green light to move from Mr. Akabori.

It is my considered opinion that the defendants, their servants or agents were negligent in putting into operation the machinery in the tunnel, in particular

A the train loader, when the plaintiff and the other visitors were present. Mr. Walker (PW1) in his evidence stated that as a matter of safety the machinery should have been inoperative in the presence of a visiting party especially when the space is restricted or limited. He is a geologist with wide experience in gold mines in South Africa where conditions would be similar. It is obvious common sense to any reasonable person that the operation of machinery unfamiliar to the visitors in such surroundings would very likely cause injury arising out of such conduct. In passing, I would say that the whole conduct of the defendants, their servants or agents from the very beginning amounted to a total disregard for the safety of the plaintiff and the other members of the visiting party to the tunnel.

C As regards the quantum of damages, it was agreed by both parties that the sum of \$32,500 be awarded for pain and suffering and loss of amenities, in so far as general damages are concerned, in favour of the plaintiff. That leaves that element of loss of future earnings to be considered. The principle in this regard is that the court's task is to give the present value of prospective loss and a lump sum must be awarded once and for all to compensate the plaintiff fully for his loss. The present case is one of rather unusual difficulty and is similar to that of *Nimmo-Smith v. Burgess Garages Ltd. & London County Council* (referred to at page 159 of *Kemp & Kemp on Quantum of Damages*, Volume 1, 2nd Edition). I say so because the subject-matter of the estimation might be termed as a series of imponderables and to arrive at the right figure is rather a precarious matter. This is so because the plaintiff's employment was not terminated by his employer in spite of losing his left leg as a result of the accident but he was allowed to carry on his former duties as a geologist with the same salary of \$900 a month. However, owing to his lack of mobility due to the use of an artificial leg, he had been detailed to supervise in the assay laboratory and research work in the office involving no physical effort instead of his former field work. Dr. Walker (PW1), the plaintiff's immediate superior, was of the opinion that if the company decided to retrench staff, the plaintiff might be affected. In the circumstances, he might find it extremely difficult to get a job with another company as a geologist "bearing in mind his disability which is a disadvantage to him". The basis of a geologist's job is field work and the plaintiff is severely handicapped. Further, he said his disability would affect his promotional prospects. The plaintiff had been working with the company for about three to four years and if not for his disability, in about five years' time it would be possible for him to earn promotion to an assistant group geologist. His salary would be increased by \$500 a month. The next higher position would be that of a group geologist to which he would be eligible for promotion in another five years' time after the first mentioned promotion, given time and experience. The difference in his earning capacity now and that of a group geologist would at least be \$1,000 a month. The retiring age with the said company is fifty-five. P.W.1's opinion is to some extent corroborated by that of Dr. J. P. Lambert, an-

other qualified group geologist of the Associated Mines. (Ex. P6). According to him, the plaintiff would be unable to do field geology which is the primary requirement in his present job and would be debarred from working in most international mines because he would not pass any medical examination which normally requires physical fitness. Without his leg it would be difficult for him to achieve the position of responsibility as a geologist. He would earn \$2,000 as a mineralogist, should he specialise himself as such, as opposed to \$3,000 which a senior geologist could earn. The effect of the evidence of both these group geologists is that the plaintiff will lose his promotional prospects in about five years' time as an assistant geologist and to continue thereafter for about five years when he would again lose the chance of promotion to a group geologist. The difference in his present salary in both cases is about \$1,000. Taking into account all the facts and circumstances of the case, I am of the view that there is every likelihood that the plaintiff will qualify for promotion as an assistant group geologist in five years' time if not for the injury. PW1 was satisfied with his work and was of the opinion that the plaintiff is a very capable geologist, above average in the performance of his work and completely reliable. On the other hand, I find that the prospect of his second promotion to a group geologist is too remote for consideration at this stage. Similarly, the possibility of retrenchment is too speculative and uncertain for consideration. In the circumstances, it would be fair and reasonable to accept the prospective loss of promotion to an assistant group geologist when he reaches the age of thirty-two, i.e. in five years' time, calculated at the rate of \$500 a month, till he reaches the retiring age of fifty-five, i.e. for a period of twenty-three years.

Mr. Tay for the plaintiff in his submission suggested as a method of calculation the use of a formula which if worked out accordingly would determine a reasonable sum. This sum if invested now at an interest of, say, 5% per annum, would produce a bigger sum in ten years' time commensurate with the award which the plaintiff should be entitled. Mr. Marjoribanks for the defendants seems to agree with the proposal for investment though he did not mention any formula in his written submission. I notice that the formula recommended by Mr. Tay is different from that discussed at page 41 of *Kemp & Kemp* on Quantum of Damage, 2nd Edition, Volume 1. This would involve myself in arithmetical calculation and I would like to quote here a passage by an American author, McCormick, in his book on Damages, at pages 303-304, which is reported verbatim in the footnote of *Kemp & Kemp*, at page 30:—

"...To do this in detail would be difficult and tedious, and no jury would attempt it, unless one of its members were an accountant. A more practical plan is to resort to tables known as 'annuity tables' or tables of present worth..."

Indeed, in practice I would say that the courts in this country normally have resort to the annuity tables which are of practical assistance in the assessment of prospective loss of this nature, as guidance. Lord Goddard in *Davies & Davies v. Smith & Smith* (1958 C.A. No. 34a — see page 355 of *Kemp & Kemp*)

A says:—

"I say at once that life tables are a guide, but they are not absolute, because, of course, life tables only show the average length of life of a person of a particular age, and a good many people live longer. A great many other people live less. The life tables take an average."

As I said earlier, in this kind of assessment, I cannot be absolute but only to award a sum on the principle of fairness and reasonableness in giving "the present value of prospective loss", bearing in mind that the plaintiff will be receiving a lump sum down instead of successive monthly salaries, that certain allowances must be given for contingencies of life and the payment of income tax for which the plaintiff will have to pay, otherwise he will have to suffer tax deduction twice over.

C The plaintiff is 27 years old now and in five years' time he will be 32. In normal circumstances he will be able to work till the retiring age of 55. That will leave 23 years' purchase. At \$500 a month difference in view of loss of promotional prospects, his total loss for this period according to the annuity table will be \$80,940. I would make a deduction of one-third of the sum for contingencies as stated above including possible increase in the plaintiff's earnings as a research geologist to which profession he would be able to devote his whole time. That will make \$26,980. Further, I would deduct 25% for income tax (see *British Transport Commission v. Gourley*⁸⁰) which the plaintiff has to pay on receiving a lump sum and that would come to \$13,490. Deducting the two sums, the net balance will amount to \$40,470. This sum, in my opinion, is fair and reasonable for loss of future earnings in favour of the plaintiff.

F It was also submitted that under this head the plaintiff would require replacements of his artificial limb from time to time. According to the Principal Medical Officer, Ministry of Health, London, (Ex. P2B) the usual life of an artificial limb in Great Britain is about five years but this also means that many additional parts are added or replaced during the period because "certain mechanical parts wear out sometimes depending on its use". It is unfortunate that the views of our local experts have not been asked for because the plaintiff is and will continue to be using the artificial limb not in the United Kingdom but in this country where the climatic conditions are different. It's "life" may be shorter, or for that matter longer, depending on its use where I would say, will be spent mostly in the research laboratory of the company. Further, no attempt has been made to apply for a locally-made limb which may cost much less. I am urged to take judicial notice of the superior quality of artificial limbs produced in Roehampton. With respect, I cannot agree without any iota of evidence to support Mr. Tay's contention. Anyway, I accept the fact that it would be reasonable for the plaintiff to change to a new limb from time to time and in the circumstances instead of the \$6,559 asked for, I would allow half the amount, i.e. \$3,279.

With regard to special damages, most of the items quoted under the particulars, other than those deleted by the plaintiff's counsel, are agreed upon by the

defendants' counsel, except for the following:—

- (1) Purchase of fruits, Brand's essence of chicken, jinseng herbs, etc. for the plaintiff.
- (2) The air passage from Kuala Lumpur to London and back and expenses incurred there.
- (3) The cost of a new artificial limb.

(1) The general principle is that the plaintiff must be prepared to prove his special damages unless it has been agreed. It is not enough for him to write down the particulars and leave them for the court to decide. It is for him to prove them. (See *Sum Kum v. Devaki Nair & Anor.*⁽⁹⁾ and *Khoo See Moi v. Tay Teik Chang*⁽¹⁰⁾). No doubt, the plaintiff gave evidence that he had purchased the extra nourishing food when he was in the hospital, but in the absence of medical evidence that they were necessary in the light of hospital food and nourishment prescribed, I am not prepared in the circumstances to allow the claim on the three items.

(2) In regard to (2), the question is whether the trip to London was indeed necessary when it is known that there are adequate medical facilities in this country to deal with the matter. The plaintiff said he went to Roehampton on medical advice but no proof was available to substantiate it. In the absence of any medical evidence that local facilities are not available or, if available, are inferior to those in Roehampton, and if so whether the London trip was necessary, instead of ordering it for application here, I am not prepared to allow the plaintiff's claim on the two items.

(3) There is medical evidence (Ex. P3B) that it is customary for an amputee to have a spare artificial limb in case of emergency repair or adjustments required on the one in use. I would therefore allow the claim on this item in view of Ex. P2B.

The total award for special damages in the circumstances amounts to \$3,392.

I therefore give judgment for the plaintiff as follows:—

(1) General damages:—	
(a) Pain and suffering and loss of amenities.	\$32,500.00
(b) Loss of future earnings including future cost of artificial limb.	43,749.00
	76,249.00
(2) Special damages, with interest as prayed.	3,392.00
	Total: \$79,641.00

- (3) Costs of the suit.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Lovelace & Hastings.*

SINO-MALAY HARDWARE CO. SDN. BHD. v. LIM HUNG FURNITURE CO. & ANOR.

[F.C. (Ong C.J. Gill and Ong Hock Sim FJJ.) March 2, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 37 of 1972]

Practice and Procedure — Garnishment — Notice of garnishment — Order for payment into court — Realization of assets — Distribution of assets — Date of realization — R.S.C. 1957, O. 46A r. 1.

In this case three garnishment notices had been issued on October 22, 1971, November 3, 1971 and January 20, 1972 respectively. The appellant sent a certified copy of his notice of garnishment to the sheriff on February 7, 1972. The sheriff had taken out a garnishment summons and the registrar on November 25, 1971 had made an order requiring the garnishee to pay the money into court on or before February 26, 1972. The money was duly paid into court on that date. The registrar took the view that the appellant was not entitled to share in the distribution of the money as he had not given a written notice of garnishment prior to the date of the order requiring payment into court. The appellant appealed.

Held, allowing the appeal: the realization of the assets in this case occurred on the date of the payment of the money into court and therefore the appellant who had lodged his claim before that date was entitled to a rateable distribution.

Cases referred to:—

- (1) *Seow Ah Fong v. Low Hong* (1931) 6 F.M.S.L.R. 188.
- (2) *Ramanathan Chettiar v. Subramania Sastrial* (1903) I.L.R. 26 Madras 179.
- (3) *Sorabji Edulji Warden v. Govind Ranji F.N. Wadia and another* (1892) I.L.R. 16 Bom. 91, 97.
- (4) *In re Oxford Benefit Building and Investment Society* (1887) 35 Ch. D. 502.

FEDERAL COURT.

K. L. Devaser for the appellants.

Ong Boo Kok for the first respondent

Liew Shou Kong for the second respondent.

Gill F.J.: This is an appeal from an order of the Senior Assistant Registrar of the High Court at Kuala Lumpur rejecting the claim under Order 46A of the Rules of the Supreme Court, 1957 by the appellant, as judgment creditor of Sharikat Pembinaan Sinar Matahari, to rateable distribution of the sum of \$7,500 paid into court pursuant to a notice of garnishment issued by the first respondent, as another judgment creditor of the said Sharikat, against one Madam Ong Poh Ling from whom that sum of money was due to the Sharikat (hereinafter referred to as the "judgment debtor"). The appellant as well as the second respondent as judgment creditors of the judgment debtor had also issued similar notices of garnishment against Madam Ong.

As regards the relevant provisions of Order 46A, sub-rule (1) of rule 1 says:

"where assets are realised by sale or otherwise in execution of an order or judgment and more persons than one have, prior to the realisation, attached the property from which such assets have been realised in execution of orders or judgments for the payment of money against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of the realisation, shall be distributed rateably among all such persons".

There are four provisos to this sub-rule. Provisos (a) and (b) clearly do not apply to the facts of this case.